Case and Comment.

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS.
INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED.
LEGAL NEWS NOTES AND FACETIÆ.

VOL. 1. JUNE, 1894. NO. 2.

CASE AND COMMENT.

Monthly. Subscription, 50 cents per annum postpaid.

THE LAWYERS' CO-OPERATIVE PUB. CO.,
Rochester, N. Y.

Branch Offices: New York, 177 Broadway. Chicago, Lakeside Building. Boston, 10 Tremont Street.

Pickwickian Jurisdiction.

That a person blissfully ignorant of the whole proceeding may have his rights cut off and obligations established against him by personal judgment in a suit of which he is charged with constructive notice through publication of summons or service on somebody else, supposed in some way to represent him, is a modern innovation, complimentary perhaps to the ingenuity of this smart generation but hardly consistent with old-fashioned principles of justice or with certain guaranties of the Federal Constitution. But by the statutes in some states, as in New York (Code Civil Procedure, §§ 432, 435, 438), such proceedings are authorized and their constitutionality remains to be tested. The legislature of New Zealand is also up to date in this matter, and by N. Z. Code, 46 Vict., No. 29, service on a defendant absent from the colony without leaving any authorized agent or attorney may be dispensed with altogether. In Ashbury *v.* Ellis [1893] A. C. 339, 62 L. J. Rep. 107, the English privy council held this statute valid, although it did not pass upon the international effect of a judgment thus obtained. A similar provision is found in the French Civil Code. In England service is authorized upon "any person carrying on business within the jurisdiction in a name or style other than his own." But in St. Gobain C. & C. Co. *v.* Hayerman's Agency [1893] 2 Q. B. 96, 62 L. J. Rep. 485, this was held not to include residents abroad. Whatever may be the law in foreign countries, we do not believe that in the United States any mere constructive service on a nonresident, whether an actual person or a corporation, satisfies the constitutional guaranty of due process of law.

Examinations for the Bar.

A marked advance in the regulation of admissions to the bar was made by a recent New York statute, providing for a uniform system of examination for the admission of attorneys, and which will go into effect January 1, 1895. Hitherto it has been generally said that a marked difference existed between the different judicial departments in respect to the thoroughness of such examinations. At all events, the new statute is clearly in the line of improvement. The only danger in respect to such examinations is that they may become subject to the criticism, which is justly made on some of the regent's examinations in New York state, that the questions call for stuff which no intelligent person would learn for any other purpose than to pass examination. Petty details, trivial technicalities, peculiar notions and pedantry of an author or his accidental phrases, and such mere abortions of scholarship which constitute a sin against mental development, and which it is a mercy to forget if forced to learn, have sometimes made the staple of examinations.

An examination which the best attorneys could not pass without special preparations for it is an absurdity. It should call only for those things which a well-informed lawyer ought to have in his mind, and not for any of the matter for which he properly relies on

reference books. The educational system, high and low, has been cursed with much incompetence and wrongful abuse of opportunities by examiners, and the tendency in systematizing, if done by narrow and pedantic people, is to run into merely technical questions which can be answered by yes and no, because these are the easiest to prepare and to mark answers upon. These imbecile examinations are well illustrated by an actual instance in which the examiner of students in ancient history, basing his question on the words of the author in hand, asked, "What were the Asiatic monarchies founded upon?" The answer, which the student was not fool enough to have memorized, was, "*The point of the Sword.*"

Legal examinations have probably not erred usually in this particular and perhaps are not likely to do so, but even in these there is reason for caution when papers are prepared and marked on a large scale.

A Reckless Insult.

The congressional investigation of Judge Jenkins, with respect to his injunction against a strike by employees of a receiver of the court, deserves more attention than it has received. It is not merely a farce played to cheat the so-called labor voters by a delusive appearance of championing their cause. In its essential character, it is a reckless and lawless attack by one department of government upon another, in plain violation of the constitution. Is it not a purely judicial question that was presented to and decided by Judge Jenkins? If so, is it not under the Federal Constitution the business of the courts to decide that question without congressional chastisement or bull dozing? The congressional committee in this case, according to the press reports, although finding the decision of Judge Jenkins to have been an honest one, disapproves it and declares it to be in excess of his powers. It does this at the very time when the case is before a higher court on appeal. What more arrogant interference with judicial functions could be made? The whole investigation seems to have been started on the insulting assumption that an unpopular decision must be corrupt, just as if some of the greatest and soundest declarations of law ever made by a court had not for the time being met surprise and popular disapproval. What rich opportunities for showing the righteousness of demagogues (provided any should ever get into Congress) are offered by this scheme of hauling a judge over the coals when his decision happens to displease any voters! But in all seriousness, this congressional incident is in real essence an unconstitutional attack on judicial independence. It is not merely indecent. It is revolutionary.

Politics in Litigation.

A thoughtful person who has occasion to notice the unprecedented increase of political cases before the courts within the last two or three years will be startled. Legislative gerrymanders in half a dozen states, condemned by the courts as shamefully unconstitutional; rival legislatures in one or two states on the verge of armed hostilities, which were happily averted by judicial decisions; the late Denver police decision on a controversy which for a time threatened a local war between the police forces on the one hand and the governor's troops on the other; the open rebellion against the Dispensary Law in South Carolina, which has since been declared unconstitutional,—and numerous other cases of more or less disgraceful conflict between departments of government, or opposing state officials, have, in a short time, produced more actual adjudications on political questions of this kind than have been made before in the whole history of the United States. Pessimists are out of place in this country, but dangerous tendencies are doing such rapid work that optimists are called upon for works as well as faith.

The right of Illinois women to vote for trustees of the State University, under the Act giving them the right to vote for "school officers," is just now a fertile source of discussion in that state. Attorney-General Maloney has just given an elaborate opinion in the negative, while the contrary opinion was officially given in 1892 by Mr. Boyle, attorney for the board of election commissioners of Cook county, and was acted upon by the board in receiving many votes of women in the election of that year for such trustees. Just now the women want to know which is right, and whether they must run the risk of the law in order to enjoy the exercise of this man-given right (if it is given). The decisions on the right of women to vote on elections of different kinds were fully presented in note in 21 L. R. A. 662.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 22, Parts 5 and 6, and Book 23, Part 1.

The annotation of these three numbers, exclusive of brief reference notes, is shown by the following index:

Among the New Decisions.

As to Banks.

Several interesting decisions respecting the law of banking have been recently published.

The right of a bank to apply a deposit made by one partner to an overdraft of the firm is denied in Adams *v.* First National Bank of Winston (N. C.) 23 L. R. A. 111.

The nature of an ordinary deposit in a bank as a loan of money is sharply brought out by a decision that a deposit in a bank of certain public funds is unconstitutional, where the loan of such funds is prohibited. This was in the case of State, First National Bank *v.* Bartley, 23 L. R. A. 67, decided in reference to permanent educational funds of the state of Nebraska.

The liability of a bank in a somewhat unusual case, which belongs to the general law of bailment rather than of strict banking, is presented in the case of Isham *v.* Post (N. Y.) 23 L. R. A. 90, in which the loan by a bank of a customer's money made as an accommodation was brought in question on the ground of negligence in making an investment in forged securities, but a judgment against the bank was reversed.

The release of the indorser of a check by delay in its presentation is considered in Kirkpatrick *v.* Puryear (Tenn.) 22 L. R. A. 785, in which the extinguishment of such liability is held to extend to the indebtedness in payment of which the check was indorsed.

Constitutional Questions.

The power of the governor to adjourn the legislature has been recently passed upon in Rhode Island in *Re* Legislative Adjournment, 22 L. R. A. 716, in which his decision that a disagreement exists, within the meaning of the constitutional provision authorizing him to declare the legislature adjourned, cannot be reviewed by the courts.

The power of the legislature to compel the supreme court to examine facts as well as law, without regard to the decision of the court below, is held unconstitutional by the Supreme Court of Wisconsin, in Klein *v.* Valerius, 22 L. R. A. 609. This statute is in marked contrast with the measures which have been compelled in other jurisdictions to relieve the pressure upon courts of last resort,—notably

the Supreme Court of the United States and the New York Court of Appeals, which had become almost buried with undecided cases.

The power of the state to own and operate a grain elevator, under a statute of Minnesota, is denied in Rippe *v.* Becker, 22 L. R. A. 857, in which such a business is held to be outside of the police power of the state and to constitute the carrying on of a work of internal improvement, within the prohibition of the state constitution.

The power of the governor to appoint an officer to fill a vacancy "until the next meeting of the legislature" is defined in People, Richardson *v.* Henderson (Wyo.) 22 L. R. A. 751, in which the meeting of the legislature after such appointment is held not to create another vacancy which can be filled by the governor, but the appointee is held within a constitutional provision providing that an officer shall hold "until his successor is qualified."

A New Nuisance.

The decision by the Supreme Court of Indiana a few months ago, in the case of Haggart *v.* Stehlin, 22 L. R. A. 577, holding that a saloon, although duly licensed, may constitute a nuisance rendering both proprietor and owner of the premises liable for damages to neighboring property, if that is depreciated in value because of the proximity of the saloon, has attracted much attention and been widely commented on. Some, however, have interpreted the decision more broadly than it justifies, to mean that a saloon is *per se* an actionable nuisance. But this the court is far from deciding. It holds merely that the business, like any other lawful business, may constitute an actionable nuisance, if, as a matter of fact, it causes a material depreciation in the value of neighboring property. In this case the decision was rendered on a demurrer, by which it was admitted that the complainant's property had been damaged to nearly one half its value. The effect of the decision is to leave the question of nuisance by a saloon, like that of any other nuisance, to be determined in view of all the circumstances and facts of the case.

Corporations.

The right of corporations to prefer creditors, which has been much discussed, has been brought sharply into notice by two important but conflicting decisions. The Texas Supreme Court in Lyons-Thomas Hardware Co. *v.* Perry Stove Mfg. Co. 22 L. R. A. 802, sweepingly condems all preferences by an insolvent corporation, while in Brown *v.* Grand Rapids Parlor Furniture Co. 22 L. R. A. 817, the United States Circuit Court in Michigan, following the law of that state, upholds such preferences, even when made in favor of the directors and stockholders of the corporation. The annotation to these cases clearly shows that the great weight of authority is between the two, upholding preferences to ordinary creditors of an insolvent corporation, but condemning such preferences to its own directors.

As to Insurance.

The Georgia Act to regulate the business of insurance, with penalties for doing business contrary to the Act, is held applicable only to corporations, by the case of Fort *v.* State, 23 L. R. A. 86, and a voluntary association called a Guarantee & Accident Lloyds was held unaffected by the statute, so that an agent of the association was not subject to any penalty for aiding its business, although the company could not be licensed to do business in the state.

An oral contract for insurance is brought in question in Newark Machine Co. *v.* Kenton Insurance Co., 22 L. R. A. 768, in which the Supreme Court of Ohio holds such a contract valid, unless forbidden by the insurer's charter or by statute.

The meaning of the words "vacant or unoccupied" in a policy of insurance is discussed in Limburg *v.* German F. Ins. Co. (Iowa) 23 L. R. A. 99, which says they must be construed with respect to the use and adaptability of the building insured, and holds that an old counter and a few bottles and jugs left in an otherwise vacant cigar store and factory are insufficient to constitute an occupancy.

The words "disease," "bodily or mental infirmity," "voluntary exposure," "unnecessary danger," are considered in respect to accident insurance in a very valuable opinion in Manufacturers' Accident Ins. Indem. Co. *v.* Dorgan, 22 L. R. A. 620, in which those terms are construed in a reasonable rather than in a narrowly technical meaning.

Executors.

The rule denying validity to an assignment of unearned salary of an officer is extended in *Re* Worthington (N. Y.) 23 L. R. A. 97, to avoid an assignment of commissions made by an executor before his accounting.

Conspiracy.

A new development of the law of conspiracy appears in Cole *v.* Murphy (Pa.) 23 L. R. A. 135, which holds that a combination of employers to resist an advance of wages demanded by an association of employees, although it would otherwise be unlawful, is justified when the statute has made the combination of the employees lawful. This is on the ground that the employers' combination is not to lower the price of wages beyond its natural point, but to resist an artificial price made by a combination which the statute allows.

Accretions.

A peculiar case as to accretions is decided in Crandall *v.* Allen (Mo.) 22 L. R. A. 591, in respect to a claim that where an intervening strip of land had been washed away, bringing the shore line to a tract not originally riparian, the accretions thereafter formed, starting from this tract, would all belong to it, even though they extended beyond its original boundary and replaced a part of the strip washed away. The court denied the claim and held that the accretions should be divided between the owners by extending their boundary lines.

The Humorous Side.

In a Connecticut case we find it quoted that in respect to the maxim of the law of England that parliament can do no wrong, Lord Holt said: "It can do several things that look pretty odd."

As legal humors with an old English flavor we offer, by courtesy of his grandson, the two following found among the papers of James Saunders, late an attorney-at-law in Manchester, England:

When is a lawyer like a poulterer? "When he is docking the (h)en tail."

A lawyer may be said to be destitute when he has digested his "Bacon," imbibed his "Hale," consumed his "Coke," and has not a suit left.

A case of contempt of court by "a stare of astonishment" and by "opening his eyes very wide," is mentioned in the Montreal *Legal News* as having occurred at Hong Kong and reported in the *Lower Canada Law Journal*, A. D. 1867, p. 107. The defendant in that case was convicted of two "tones and manners." Now, says the *Legal News*, the court of review at Montreal has discovered a contempt in "six notes of exclamation" following an extract from the judgment under review.

Apropos of the above-described manners is the following anecdote of Sir Fletcher Norton, which is told by the *Pall Mall Gazette*. Sir Fletcher, who was noted for his scant courtesy and arrogance, while discussing a question of manorial rights before Lord Mansfield, said, "I can illustrate the point, my lord, in my own case, for I have two little manors." "We all know that, Sir Fletcher," sweetly responded the Chief Justice.

In holding that the exemption from garnishment of $100 wages of a laborer having a family may be claimed every time a garnishment is attempted, and in denying the correctness of what the court calls an astonishing result in the lower court which held that the exemption could be claimed only once a year, a Mississippi court says the fears of the counsel for the creditor are premature, and that "when the golden age returns and laborers having families earn from $1,200 to $12,000 per annum, if debt and credit then survive, doubtless a legislature, if one is left, will reduce the exemptions of the wealthy laboring man."

Miscellany.

The graduating thesis of Miss Mary Margaret Bartelme on "Spendthrift Trusts," being a review of the doctrine of Nichols *v.* Eaton, 91 U. S. 716, which was delivered on her graduation from the Northwestern University Law School, is published in the *Chicago Legal News*, to show, as that journal says, "what a young woman, with a good education, whose mind has been disciplined by several years' teaching and by two years of study in the law school, can do in preparing a paper upon a technical and difficult legal subject." The *Journal*, founded by Myra Bardwell, naturally takes interest in the creditable work of a young woman lawyer, and this thesis is certainly creditable. The portrait of the young woman is also published in the same journal, and we think it fully as admirable as those of the Law School professors which appear in the same paper.